Siti Sakinah bt Meor Omar Baki v Zamihan Mat Zin & Anor

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22NCVC-517–09 OF 2015
WAN AHMAD FARID JC
21 APRIL 2017

Tort — Defamation — Defences — Plaintiff sued defendants for defamation — Whether first defendant proven defences of fair comment and qualified privilege — Whether Reynolds privilege proven by second defendant

Tort — Defamation — Impugned statement — Plaintiff sued defendants for defamation — Plaintiff acted on behalf of non-governmental organisation known as Syria Care — Whether Syria Care had necessary locus to maintain action — Whether first defendant uttered words as reflected in impugned statements — Whether plaintiff proven elements of defamation against both defendants

The plaintiff, the chairman of an organization known as Syria Care sued one Zamihan Mat Zin, an officer with the Ministry of Home Affairs ('the first defendant') and Star Media Group Bhd ('the second defendant') for defamation. The plaintiff's action was based on the alleged statement made by the first defendant which was reported by *The Star Online*, owned and operated by the second respondent ('the impugned statement'). The whole report was marked as exh P1. Essentially, the first defendant's statement was that Syiah groups hide behind non-governmental organisations (NGO) such as Syria Care. The impugned statements were allegedly made by the first defendant during an interview conducted by two journalists from Bernama, SP1 and SP2 in a *Bernama TV* program known as 'Ruang Bicara' on 26 June 2014. The issues for determination were: (a) whether Syria Care had the necessary locus to maintain the present action; (b) whether the first defendant did utter the words as reflected in the impugned statements; and (c) whether the plaintiff had proven the elements of defamation against both the defendants. The first defendant raised the defences of fair comments and qualified privilege whereas the second defendants raised the *Reynolds* privilege.

Held,

(1) The alleged defamatory words, if proven, would tend to lower Syria Care in the estimation of right thinking members of society generally or tends to make them shun or avoid the organisation. Donations would have been adversely affected and goodwill tarnished. In the circumstances, Syria Care had the necessary locus standi to institute this defamatory

action; and proper procedure under s 9(c) of the Societies Act 1966 was adhered to by the plaintiff (see paras 4–5).

(2) Even though the first defendant had pleaded in para 27 of his defence that he had contacted the plaintiff's solicitors to explain things, there was nothing in his witness statement that he actually did so. On the contrary, the first defendant, in answer to Q20 to his witness statement testified that he did nothing. The court found the first defendant to be unreliable witness as his answers were dithering and contradictory as against his own pleadings. Both witnesses who interviewed the first defendant, confirmed that the first defendant had named Syria Care, and that exh P1 reflected the accuracy of the interview. The court did not find any reason for SP1 and SP2 to give false testimonies against the first defendant as they were professional independent witnesses without any interest in the outcome of the proceedings. The court accepted them as the witnesses of truth (see paras 20–21).

(3) Since the first defendant had alleged that exh P1 was not what he actually said in the said interview, the onus was on the first defendant to prove the same. Save for the bare denial, the first defendant had failed to discharge this onus. In the circumstances, based on the totality of the evidence and on a balance of probabilities, the first defendant had in fact made the impugned statements as reported in exh P1 (see para 22).

(4) The impugned statements, in associating the plaintiff with Syiah and other international Syiah groups such as Hezbollah in Lebanon, would certainly tend to injure or prejudice the reputation of the plaintiff. Therefore, the impugned statements were defamatory to the plaintiff without having to proof special damage (see para 28).

(5) The impugned statements referred to the plaintiff since the word Syria Care was clearly mentioned in exh P1. It was also not in dispute that the impugned statements were published. Therefore, the three essential elements of defamation had been successfully established by the plaintiff (see paras 29–30 & 32).

(6) The first defendant had miserably failed to particularise the alleged fair comments, as such, the first defendant had failed to comply with O 78 r 3(2) of the Rules of Court 2012. The first defendant was therefore barred from relying on the defence of fair comments. Further, the first defendant had also failed to particularise the defence of qualified privilege. On the balance of probabilities, the first defendant was indifferent to the truth and this would disentitle him from the defence of qualified privilege (see paras 34–36).

(7) The chief news editor of the second defendant ('SD2') explained that the impugned statements and the remaining paragraphs in exh P1 were lifted off *Bernama*'s wire service for publication by the second defendant. SD2

testified that the impugned statements had carried a message of public interest and concern. The court accepted SD2's evidence as being the true narrations of the background and circumstances that led to the publication of the impugned statements, and that there was no malice involved on the part of the second defendant. The court also found that the allegations contained in the impugned statements were attributed and not adopted by the second defendant. The second defendant had acted reasonably on the issue of 'public interest and concern' in relying on the English version of the *Bernama* wire news. On totality, the second defendant had successfully raised the defence of *Reynolds* privilege and was therefore not liable (see paras 40, 42 & 45–46).

[Bahasa Malaysia summary

Plaintif, pengerusi pertubuhan yang dikenali sebagai Syria Care menyaman seorang yang bernama Zamihan Mat Zin, pegawai di Kementerian Hal Ehwal Dalam Negeri ('defendant pertama') dan Star Media Group Bhd ('defendan kedua') bagi fitnah. Tindakan plaintif adalah berdasarkan ke atas pernyataan yang didakwa dibuat oleh defendan pertama yang dilaporkan oleh *The Star Online*, dimiliki dan dikendalikan oleh responden kedua ('pernyataan yang dimaksudkan'). Laporan keseluruhan ditanda sebagai eksh P1. Pada dasarnya, pernyaataan defendan pertama adalah bahawa kumpulan-kumpulan Syiah bersembunyi di belakang pertubuhan-pertubuhan bukan kerajaan (NGO) seperti Syria Care. Pernyataan yang dimaksudkan tersebut adalah didakwa dibuat oleh defendan pertama semasa temuduga dijalankan oleh dua wartawan daripada Bernama, SP1 dan SP2 di dalam program *TV Bernama* yang dikenali sebagai 'Ruang Bicara' pada 26 Jun 2014. Isu-isu untuk penentuan adalah: (a) sama ada Syria Care mempunyai locus yang perlu untuk mengekalkan tindakan ini; (b) sama ada defendan pertama telah mengatakan perkataan-perkataan seperti yang dibayangkan di dalam pernyataan yang dimaksudkan; dan (c) sama ada plaintif telah membuktikan unsur-unsur fitnah terhadap kedua-dua defendan. Defendan pertama membangkitkan pembelaan komen adil dan pelindungan bersyarat manakala defendan kedua membangkitkan pelindungan *Reynolds*.

Diputuskan

(1) Perkataan-perkataan fitnah yang didakwa, jika dibuktikan, akan secara amnya menurunkan Syria Care dalam anggaran pemikiran betul ahli pertubuhan atau membuatkan mereka menjauhkan diri atau mengelak pertubuhan. Derma-derma akan terjejas dengan teruk dan nama baik akan dicemarkan. Dalam keadaan, Syria Care mempunyai locus standi yang diperlukan untuk memulakan tindakan fitnah ini; dan prosedur yang betul di bawah s 9(c) Akta Pertubuhan 1966 dipatuhi oleh plaintif (lihat perenggan 4–5).

(2) Walaupun defendan pertama telah memplidkan di perenggan 27

terhadap pembelaannya yang dia telah berhubung dengan peguam plaintif untuk menjelaskan perkara, tidak terdapat apa-apa dalam pernyataan saksinya yang dia sebenarnya berbuat sedemikian. Sebaliknya, defendan pertama, dalam jawapan kepada Q20 kepada pernyataan saksinya memberi keterangan bahawa dia tidak berbuat apa-apa. Mahkamah mendapati defendan pertama adalah saksi yang tidak boleh dipercayai kerana jawapannya adalah teragak-agak dan bertentangan terhadap plidingnya sendiri. Kedua-dua saksi yang menemuduga defendan pertama, mengesahkan bahawa defendan pertama menamakan Syria Care, dan bahawa eksh P1 membayangkan ketepatan temuduga tersebut. Mahkamah tidak mendapati apa-apa sebab untuk SP1 dan SP2 untuk memberi keterangan palsu terhadap defendan pertama kerana mereka adalah saksi-saksi bebas profesional tanpa apa-apa kepentingan di dalam keputusan prosiding tersebut. Mahkamah menerima mereka sebagai saksi-saksi yang benar (lihat perenggan 20–21).

(3) Memandangkan defendan pertama telah mendakwa bahawa eksh P1 bukan apa yang sebenarnya dia katakan di dalam temuduga tersebut, beban adalah ke atas defendan pertama untuk membuktikannya. Kecuali penafian semata-mata, defendan pertama telah gagal untuk melepaskan beban ini. Dalam keadaan, berdasarkan keseluruhan keterangan dan atas imbangan kebarangkalian, defendan pertama telah sebenarnya membuat pernyataan yang dimaksudkan seperti dilaporkan di dalam eksh P1 (lihat perenggan 22).

(4) Pernyataan yang dimaksudkan, dalam melibatkan plaintif dengan Syiah dan kumpulan Syiah antarabangsa yang lain seperti Hezbollah di Lebanon, pasti akan merosakkan atau memperjudiskan reputasi plaintif. Oleh itu, pernyataan yang dimaksudkan adalah fitnah kepada plaintif tanpa perlu membuktikan ganti rugi khas (lihat perenggan 28).

(5) Pernyataan yang dimaksudkan merujuk kepada plaintif memandangkan perkataan Syria Care jelas disebut di dalam eksh P1. Ia juga tidak dipertikaikan bahawa pernyataan yang dimaksudkan diterbitkan. Oleh itu, ketiga-tiga unsur penting fitnah telah berjaya dibuktikan oleh plaintif (lihat perenggan 29–30 & 32).

(6) Defendan pertama telah gagal teruk untuk memperincikan komen adil yang didakwa tersebut, seperti, defendan pertama telah gagal untuk mematuhi A 78 k 3(2) Kaedah-Kaedah Mahkamah 2012. Defendan pertama oleh itu dihalang daripada bergantung ke atas pembelaan komen adil. Selanjutnya, defendan pertama juga gagal untuk memperincikan pembelan pelindungan bersyarat. Atas imbangan kebarangkalian, defendan pertama tidak mempedulikan kebenaran dan ini akan mengecualikan dia daripada pembelaan pelindungan bersyarat (lihat perenggan 34–36).

(7) Ketua pengarang berita defendan kedua ('SD2') menjelaskan bahawa pernyataan yang dimaksudkan dan perenggan yang kekal di dalam eksh P1 dilancarkan oleh agensi berita untuk penerbitan Bernama oleh defendan kedua. SD2 memberi keterangan bahawa pernyataan yang dimaksudkan telah membawa mesej kepentingan awam dan keprihatinan. Mahkamah menerima keterangan SD2 sebagai pengisahan sebenar latar belakang dan keadaan yang membawa kepada penerbitan pernyataan yang dimaksudkan, dan bahawa tidak terdapat niat jahat yang terlibat oleh pihak defendan kedua, mahkamah juga mendapati bahawa dakwaan-dakwaan yang terdapat di dalam pernyataan yang dimaksudkan telah dikaitkan dan tidak digunapakai oleh defendan kedua. Defendan kedua telah bertindak secara munasabah atas isu 'public interest and concern' dalam bergantung ke atas versi Bahasa Inggeris berita *Bernama*. Atas keseluruhannya, defendan kedua telah berjaya membangkitkan pembelaan pelindungan *Reynolds* dan oleh itu tidak bertanggunjawab (see paras 40, 42 & 45–46).]

Notes

For a case on impugned statements, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) para 557.

For cases on defences, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 474–518.

Cases referred to

Al-Fagih v HH Saudi Research and Marketing (UK) Ltd [2001] All ER (D) 48 (Nov), CA (refd)

Amber Court Management Corp & Ors (suing in their capacity of council members of Amber Court Management Corp Management Committee) v Hong Gan Gui & Anor [2016] 2 MLJ 85, CA (folld)

Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor [2010] 2 MLJ 492; [2010] 3 AMR 514, HC (folld)

Dato' Sukri bin Haji Mohamed v Wan Muhammad Azri bin Wan Deris [2016] MLJU 68, CA (refd)

Datuk Husam bin Musa v The New Straits Times Press (M) Bhd & Ors [2014] 8 MLJ 370, HC (refd)

Dr Syed Azman bin Syed Ahmad Nawawi & Ors v Dato' Seri Hj Ahmad bin Said [2015] 5 MLJ 141, CA (refd)

Hasnul bin Abdul Hadi v Bulat bin Mohamed & Anor [1978] 1 MLJ 75 (refd)

Hellwig v Mitchell [1910] 1 KB 609, KBD (refd)

Horrocks v Lowe [1975] AC 135, HL (refd)

Jameel (Mohammed) and another v Wall Street Journal Europe Sprl [2007] 1 AC 359, HL (refd)

Pernas Sime Darby Holdings Sdn Bhd v M Poovanandran [1986] 1 MLJ 418 (refd)

Reynolds v Times Newspapers Ltd [2001] 2 AC 127, HL (refd)

Sivabalan a/l P Asapathy v The New Straits Times Press (M) Bhd [2010] 9 MLJ 320, HC (refd)
Syed Husin Ali v Sharikat Perchetakan Utusan Melayu Berhad & Anor [1973] 2 MLJ 56 (refd)
Tan Sri Dato' Lim Guan Teik v Tan Kai Hee [2014] 9 MLJ 363; [2013] 10 CLJ 771, HC (folld)
Webb v Beavan (1883) 11 QBD 609, QBD (folld)

Legislation referred to

Administration of the Religion of Islam (State of Selangor) Enactment 2003 s 47
Rules of Court 2012 O 78 r 3(2)
Societies Act 1966 s 9(c)
Syariah Criminal Offences (Selangor) Enactment 1995 s 13

Meor Amir (Shukor & Assoc) for the plaintiff.
Yazer Azzad Zainudin (Azril & Assoc) for the first defendant.
Rueben Mathiavaranam (Ng Peng Ying with him) (Sufian TH Liew & Partners) for the second defendant.

Wan Ahmad Farid JC:

[1] This is a defamation case. The plaintiff is the chairman of an organization known as Syria Care, which was established under the Societies Act 1966 ('the SA') and is filing the action in this suit in her capacity as the 'public officer' of Syria Care under s 9(c) of the same.

[2] Before I proceed in deliberating the evidence given at the trial and the liability of the parties herein, let me dispose a preliminary issue, even though it has not been canvassed by the parties. It is this. Can the plaintiff, being a society under the SA, institute an action in defamation? In other words, does Syria Care have the necessary locus to maintain this action?

[3] The short answer to this can be found in proposition of law as expounded by the Court of Appeal in the case of *Amber Court Management Corp & Ors (suing in their capacity of council members of Amber Court Management Corp Management Committee) v Hong Gan Gui & Anor* [2016] 2 MLJ 85 (CA). In that case, Badariah Sahamid JCA in delivering the decision of the Court of Appeal held as follows:

> [51] In the case of *Chinese Empire Reform Association v Chinese Daily Newspaper Publishing Co Ltd* [1907] 13 BCR 141, the court held that non-trading and trading corporations can maintain actions in defamation provided that there was injury to its property or business. In this case the plaintiff, a non-trading corporation was incorporated under the Benevolent Societies Act with express powers to transact

business, acquire and purchase property as well ass ell, exchange, mortgage let or otherwise dispose of property, real and personal.

[52] Morrison J observed:

> a non-trading corporation has the right to acquire property which may be the source of income or revenue. And the transaction of the business incidental thereto creates a reputation, rights and interests, in no essential respects different from that of an individual or trading corporation.

In reiterating the position at common law, the Court of Appeal further held that a trading corporation and non-trading corporation can sue for defamation on proof that the defamatory statements affect its business, revenue or income or good will.

[4] The long and short of it is this. If the alleged defamatory words had one way or the other affected the revenue, income or good will of Syria Care, then it can maintain an action in defamation. The plaintiff, Siti Sakinah, who is also SP3, had testified this in answer to Q9 of her witness statement (WS — SP3):

> Pihak kami juga menghantar susu dan pakaian musim sejuk sumbangan orang ramai dari Malaysia dan juga tempahan baju musim sejuk baru dan susu dari China yang dihantar terus ke Turki seterusnya dikeluarkan dari pelabuhan dengan kerjasama IHH sebuah NGO terbesar di Turki dan di bawa masuk ke dalam Syria dan diuruskan seterusnya oleh rakan NGO yang bekerjasama dengan kami.

It goes without saying that the alleged defamatory words, if proven, would tend to lower Syria Care in the estimation of right thinking members of society generally or tends to make them shun or avoid the organisation. Donations would have been adversely affected and goodwill tarnished.

[5] In the circumstances, applying the principle of law as stated in *Amber Court Management,* my preliminary finding is that: (i) Syria Care has the necessary locus standi to institute this defamatory action; and (ii) proper procedure under s 9(c) of the SA was adhered to by the plaintiff.

THE FACTUAL BACKGROUND

[6] The first defendant is an officer with the Ministry of Home Affairs where he works on rehabilitating extremists charged or convicted under the relevant security laws.

[7] The plaintiff's action is based on the alleged statement made by the first defendant which was reported by *The Star Online*, owned and operated by the second defendant, on 27 June 2014.

[8] Part of the impugned statements, which is the subject matter of the plaintiff's complaint are as follows:

(a) 'Zamihan also urged the government to continue monitoring Syiah groups in the country as they are said to be intimate with Syiah groups abroad, including Hezbollah in Lebanon';

(b) 'Hezbollah is also involved in a civil war in Syria to defend the rights of their Syiah brothers in the Bashar AI-Asad government'; and

(c) and most of them (Syiah groups) hide behind non-governmental organisations ('NGO') using names such as Syria Care, Free Syrian Army, Syria Foundation and others but instead have a different meaning and objective', he said.

These statements in (a), (b) and (c) will be collectively referred to as the 'impugned statements'. The whole report, entitled 'Senseless jihad puts Malaysia as violenee hub says Home Ministry officer' was marked as exh P1.

Did the first defendant utter the impugned statements?

[9] Before I proceed with the ingredients of a defamatory action, let me dispose of another issue, which is whether the first defendant did actually utter the words as reflected in the impugned statements. If it can be established that he never made the impugned statements, then he could not be possibly liable, no matter how defamatory the words are. If, on the other hand, and on the balance of probabilities, it can be proven that the first defendant did in fact make the impugned statements, the next stage would be for me to deliberate on the issue of whether such statement was defamatory.

[10] In his defence, the first defendant pleaded that he never referred to the plaintiff by name, as reported by the *Star Online*. In fact, he insisted that he never uttered the word 'Syria Care' in the course of the interview. It was in fact, a bare denial.

[11] The impugned statements were allegedly made by the first defendant during an interview conducted by two journalists from Bernama, Norazurra bt Abdul Aziz ('SP1') and Rosemarie Khoo bt Mohd Sani ('SP2') in a *Bernama TV* program known as 'Ruang Bicara' on 26 June 2014. In her witness statement, SP1 testified that the first defendant did name the plaintiff's organisation, Syria Care, in the interview. She confirmed that what was reported in P1 was the true and accurate version of the interview. The question and answer to Q7 of her witness statement, marked as WS — SP1, read as follows:

Q7: Sila rujuk perenggan 10, 11 dan 12 di mukasurat 2 dan 3 Ikatan Dokumen

Bersama [exhibit P-1], sila sahkan samaada perkataan-perkataan yang dilaporkan ini adalah dikeluarkan oleh Defendan Pertama?

A7: Ya.

[12] During cross-examination, learned counsel for the first defendant suggested to the witness that the first defendant did not at all material times refer to the word 'Syria Care' which she disagreed. The exchange went as follows:

1st D/Counsel: Saya cadangkan kepada Cik Azurra sebenarnya ketika temuramah tersebut berlangsung antara Cik Azurra dan defendan pertama pada temuramah tersebut defendan pertama tidak pernah sekali mengeluarkan perkataan Syria Care.

SP1: Tidak setuju.

1st D/Counsel: Saya katakan pada Cik Azurra bahawa sekiranya transkrip tersebut ada buat word by word tersebut ia dapat menunjukkan defendan pertama tidak bercakap atau menyebut perkataan Syria Care?

SP1: Tidak setuju.

[13] SP2 who also was at the interview confirmed that the contents of the interview were as reflected in exh P1. During cross-examination, it was suggested to her that the first defendant did not mention the word 'Syria Care' at all, which she disagreed.

[14] In other words, both witnesses who interviewed the first defendant, confirmed that the first defendant had named 'Syria Care', and that exh P1 reflected the accuracy of the interview.

[15] The line of questioning on the part of learned counsel for the first defendant during cross-examination of the two witnesses revolved on two issues. First is that, although the audio recording and notes were made by both witnesses, they were not exhibited in court. Secondly, they were two versions of the news as carried by *Bernama*, one in English and the other in Bahasa Melayu. The Bahasa Melayu version, which was carried by *Utusan Malaysia Online* on 27 June 2014 had omitted any reference to Syria Care, Free Syrian Army and Syria Foundation.

[16] On the first issue, SP1 explained that her MP3 had a very limited storage and after a certain period, which is normally between two to three months, she would normally delete it to clear the memory for the purpose of future assignments. SP2 gave the same explanation in respect of the audio recording, which she captured through her mobile phone. I accept this explanation. I also take cognisance that journalist do keep their audio recording made during assignments and even interview notes only for a certain period of

time only. Since the interview was conducted in 2014, I accept that it is normal for the notes to be destroyed, especially so when there was no complaint made by any party after two or three months had lapsed.

[17] With regard to the different versions, to my mind, the issue is irrelevant for the determination of the case. The omission of the mention of Syria Care in the Bahasa Melayu version of the report does not negate that it was uttered by the first defendant during the said interview, which was confirmed by both SP1 and SP2 who interviewed him. Both SP1 and SP2 were shown with P1, and they confirmed that it was the accurate version of the report when compared to the said interview.

[18] The first defendant denied having referred to Syria Care in the said interview. He admitted mention the word 'Hezbollah'. He conceded referring to certain NGOs but denied any reference ever made to Syria Care. In answer to Q18 of his witness statement marked as 'WS-SD1' he said, inter alia, as follows:

> Saya ada menyatakan pendapat saya mengenai pergerakan kumpulan syiah yang bergerak di bawah nama NGO, tetapi saya tidak menyebut nama Syria Care sebagai NGO yang dikatakan tersebut.

[19] The first defendant was served wrth the letter of demand by the solicitors acting for the plaintiff dated 18 June 2015, demanding him to retract the impugned statements and further, to apologise for the same. The letter of demand, marked as P6 was received by the first defendant on 23 June 2015. He duly acknowledged receipt of the letter. Despite claiming that he was not aware of the publication of the impugned statements in exh P1, the first defendant did not take any proactive step to rectify the matter after having received the letter of demand. If at all he did not make any reference to Syria Care in the said interview, he could have responded to the letter of demand and explained things. Unfortunately, there was nothing before the court that he did that.

[20] Despite having pleaded in para 27 of his defence that he had contacted the plaintiff's solicitors to explain things, there was nothing in his witness statement that he actually did so. On the contrary, the first defendant, in answer to Q20 to his witness statement testified that he did nothing. It goes as follows:

> Surat tersebut diserahkan kepada saya di Pejabat saya di KDN oleh peguamcara Plaintif sendiri. Saya tidak memberikan apa-apa tindakbalas kepada surat tersebut kerana Plaintif membuat satu dakwaan yang tidak berasas sama sekali.

I find the first defendant to be unreliable witness as his a nswers were dithering and contradictory as against his own pleadings.

[21] In my considered opinion, the subsequent conduct of the first defendant after having received the letter of demand is a relevant factor. In *Tan Sri Dato' Lim Guan Teik v Tan Kai Hee* [2014] 9 MLJ 363; [2013] 10 CLJ 771, the defendant too, did not respond to the letter of demand served on him in respect of an alleged defamatory remarks made by the defendant. The court held that such a failure to dispute .the contents could be construed against the defendant. Further, I do not find any rhyme or reason for SP1 and SP2 to bear false testimonies against the first defendant as they are professional independent witnesses without any interest whatsoever in the outcome this proceedings. I accept them as the witnesses of truth and I so hold.

[22] Since the first defendant had alleged that exh P1 was not what he actually said in the said interview, the onus was on the first defendant to prove the same. Save for the bare denial, the first defendant had failed to discharge this onus. In the circumstances, having weighed the totality of evidence and on a balance of probabflitfes, I hold that the first defendant had in fact made the impugned statements as reported in exh P1.

The elements of defamation

[23] Having decided on the two preliminary issues as aforesaid, the next stage would be for me to consider whether the plaintiff had managed to prove the elements of defamation against both of the defendants. The Court of Appeal in *Dr Syed Azman bin Syed Ahmad Nawawi & Ors v Dato' Seri Hj Ahmad bin Said* [2015] 5 MLJ 141 (CA) had reiterated the long standing principle of law that in order to succeed in a defamation action, the plaintiff must establish that (a) the statement is defamatory; (b) the statement refers to the plaintiff; and (c) it has been published.

[24] I will deal with the said requirements in turn.

Whether the impugned statements are defamatory

[25] In *Hasnul bin Abdul Hadi v Bulat bin Mohamed & Anor* [1978] 1 MLJ 75, it was held that to call a person 'Abu Jahal' is defamatory and the publication of the words 'Abu Jahal' is actionable per se. What if the organisation such as the plaintiff, is referred to as a Syiah group? Would any reference to Syiah have the tendency to excite against the plaintiff the adverse opinion of others within the meaning of the proposition of law explained in *Syed Husin Ali v Sharikat Perchetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56?

[26] Before me, learned counsel for the plaintiff argued that the reference to

'Syiah' is capable of defamatory meaning. He referred me to the Government of Selangor *Gazette* dated 17 October 2013, which was essentially a *fatwa* made by the Selangor Fatwa Committee pursuant to s 47 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003. Clause 2(i) of the said fatwa reads as follows:

> Oleh itu, Jawatankuasa Fatwa Negeri Selangor memutuskan bahawa —
>
> (i) mana-mana orang Islam samaada secara individu atau berkumpulan adalah dilarang untuk berpegang atau menjadi pengikut ajarah Syiah dan sesiapa yang sengaja melakukannya adalah disifatkan mengamalkan ajaran, pegangan dan fahaman yang bercanggah dengan ajaran Islam yang sebenar.

Clause 2(x) of the same made it an offence to go against the fatwa and provide as follows:

> (x) mana-mana orang Islam yang melakukan perkara-perkara di atas adalah melakukan suatu kesalahan dan boleh diambil tindakan di bawah undang-undang yang berkuatkuasa di negeri Selangor.

[27] In the state of Selangor, it is an arrestable offence to go against the fatwa under s 13 of the Syariah Criminal Offences (Selangor) Enactment 1995, which upon conviction shall be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both. This is a very serious allegation, which if it has a basis, can expose the office bearers of the plaintiff to a possible criminal charge in the Syariah court resulting in a corporal punishment upon conviction. It is a well-established principle of law that words imputing a criminal offence are actionable per se without proof of special damage. In *Webb v Beavan* (1883) 11 QBD 609 where Pollock B, held that 'words which impute any criminal offence are actionable per se'.

[28] It is my respectful finding that the impugned statements, in associating the plaintiff with Syiah and other international Syiah groups such as Hezbollah in Lebanon, would certainly tend to injure or prejudice the reputation of the plaintiff. Applying *Webb v Beavan,* the impugned statements are actionable per se without proof of special damage. In fact, in *Hellwig v Mitchell* [1910] 1 KB 609 Bray J held as follows:

> In the absence of special damage slander is only actionable in certain cases, one of which is where the words impute the commission of a criminal offence punishable by imprisonment.

In *Syed Husin Ali,* Mohd Azmi J (as he then was) explained the law as follows:

> Thus, the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement

A to be true. Another test is: would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?

Applying the facts to the foregoing authorities, I therefore hold that the impugned statements were defamatory to the plaintiff without having to proof special damage.

Whether the impugned statements referred to the plaintiff and published

[29] Having made the finding that the impugned statements were actually made by the plaintiff, it is also my finding that they were referred to the plaintiff since the word Syria Care was clearly mentioned in exh P1.

[30] It is also not in dispute that the impugned statements were published. In law, at least one other person must hear or read the statement and understand it.

[31] SP4, Mohamad Taufiq bin Mad Salleh, had testified that he had read exh P1 on the same day it was published in the *Star Online*. He said that he was disappointed that Syria Care was associated with Syiah and terrorism.

[32] I therefore hold that the three essential elements of defamation as expounded by the Court of Appeal in *Dr Syed Azman* has been successfully established by the plaintiff.

The defence: The first defendant

[33] The first defendant's defence is straightforward and simple. He denied having named the plaintiff in the impugned statements and put the plaintiff to strict proof thereof. In *Pernas Sime Darby Holdings Sdn Bhd v M Poovanandran* [1986] 1 MLJ 418, Zakaria Yatim J held as follows:

> In the statement of defence, the defendant states that 'the Defendant denies paras 3, 4 and 5 of the statement of claim and puts the Plaintiffs to strict proof of the same'.
>
> It is clear that the defence is a blank denial of the plaintiff's claim. There is no indication as to what is the nature of the defence. In my view it is nothing but a sham defence and the senior assistant registrar was right in ordering that the defence be struck off.

In the instant case, the phrase 'plaintif diletakkan beban pembuktian yang kukuh' appeared at least 11 times in the first defendant's defence. They are scattered everywhere in the pleadings so much so that is a gigantic task to discern the real nature of the first defendant's defence. It is clear to me that these

are blank denials on the part of the first defendant.

[34] Next, in para 12 of his defence, the first defendant, in the alternative, pleaded fair comments and qualified privilege. I need only to refer to O 78 r 3(2) of the Rules of Court 2012 ('the ROC') which provides as follows:

> Where in an action for libel or slander the defendant alleges that, in so far as the words complained of consist of statements of fact, they are true In substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment .on a matter of public interest, or pleads to the like effect, he must give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true.

The plea of fair comments in para 12 of the first defendant's defence are bare averments and nothing more. The first defendant had miserably failed to particularise the alleged fair comments as required under the rule. I respectfully agree with the finding of my learned sister Lau Bee Lan J in *Tan Sri Lim Guan Teik* that the defendant must particularise which are the words in the impugned statements of the plaintiff are comments and which are facts.

[35] It is therefore my finding that the first defendant had failed to comply with O 78 r 3(2) of the ROC. The Court of Appeal in *Dato' Sukri bin Haji Mohamed v Wan Muhammad Azri bin Wan Deris* [2016] MLJU 68 (CA) made the following observations:

> Moreover O 78 r 3(2) of thr ROC 2012 provides that a defendant to an action for libel or slander must give particulars stating which of the words complained of he alleges are statements of fact and of facts and matters he relies on in support of the allegation that the words are true. In the case before us, the respondent had not complied with the requirement of O 78 r 3(2) of the ROC 2012.
>
> Therefore we agree with the submission by the learned counsel for the appellant that the respondent has failed in his defences to the claim of making defamatory statements of the appellant.

In the result, since the first defendant had failed to comply with O 78 r 3(2) of the ROC, he is therefore barred from relying on the defence of fair comments.

[36] The first defendant had also failed to particularise the defence of qualified privilege. In order to succeed in this defence, the first defendant should have an 'honest belief' or a 'positive belief in the truth of what he published'. This proposition of law can be seen in *Horrocks v Lowe* [1975] AC 135 (HL) where Lord Diplock said as follows:

> ... what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally

A though tautologously termed, 'honest belief'. If he publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false.

B Put it differently, and having regard to the evidence adduced before the court, it is my finding on the balance of probabilities that, the first defendant was indifferent to the truth and this would disentitle the first defendant from the defence of qualified privilege.

C *The defence: The second defendant*

[37] The second defendant's defence is premised on what is now in the legal parlance known as the *Reynolds* privilege, which as the name suggests, was derived from the House of Lords' decision in *Reynolds v Times Newspapers Ltd* D [2001] 2 AC 127 (HL). The *Reynolds* 'public interest' defence is effectively an extension of the defence of qualified privilege, and is based on public interest and responsible journalism, which recognised that the media has a duty to disseminate information of public interest. As such, the *Reynolds* 'public interest' defence, requires the defendant first, to establish that the statement is E published on a matter of public interest. Once that is established, the court must consider whether the media acted reasonably in publishing the material (ie responsible journalism). In this regard, the court will consider the various factors, where applicable; see *Datuk Husam bin Musa v The New Straits Times Press (M) Bhd & Ors* [2014] 8 MLJ 370.

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[38] In its defence, the second defendant pleaded that the impugned statements were published on an occasion of *Reynolds* privilege, in that, the words complained of were of public concern and interest. The second defendant further averred that the impugned statements were sourced from G *Bernama*, Malaysia's national news organisation, which is reputable and held in high regard.

[39] The House of Lords in *Reynolds* had set out the guidelines for consideration in deciding whether a publication should be accorded with the H protection of qualified privilege. Lord Nicholls said as follows:

> Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only. 1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual I harmed, if the allegation is not true. 2. The nature of the information, and the extent to which the subject matter is a matter of public concern. 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. 4. The steps taken to verify the information. 5. The status of the information. The allegation may have already been the subject of an investigation which commands respect. 6. The urgency of the

matter. News is often a perishable commodity. 7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary. 8. Whether the article contained the gist of the plaintiffs side of the story. 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements off act. 10. The circumstances of the publication, including the timing.

This list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case.

[40] At the trial, Devid Rejah Kanapathy, SD2, who is the chief news editor of the second defendant, had testified on its behalf. He explained that the impugned statements and the remaining paragraphs in P1 were lifted off *Bernama*'s wire service for publication by the second defendant SD2 testified that the impugned statements had carried a message of public interest and concern. He later explained what he meant by 'public interest and concern', which are as follows:

Awareness of the possible existence of Syiah (Shiite) groups in the country professing the Syiah version of Islam which has been outlawed, the call on the government to monitor their movements, weeding them out, halting their proliferation and spread of the Syiah doctrine within the country and

Also attempts undertaken in ensuring they are prevented from causing or facilitating the causing of any possible acts of terror or waging war against the Sunni Muslims of Malaysia and the country as a whole.

SD2's testimony on the issue of 'public interest and concern' was not vigorously challenged by learned counsel for the plaintiff during cross-examination. In fact, the SD2's interpretation of 'public interest and concern' was never challenged by learned counsel for the plaintiff, though it was the crucial part that forms the germane of the second defendant's defence. Counsel was only preoccupied with the issue relating to the practice of the Syiah sect, which was said to a very sensitive one in the context of the Malaysian society.

[41] In the course of oral submissions, I had asked Encik Reuben Mathiavaranam whether the second defendant had taken the steps to verify the information as contained in the *Bernama* wire news as in guideline No 4 in *Reynolds*. His reply was the requirement was not absolute. I think there is a respectable authority to support this proposition. In *Al-Fagih v HH Saudi Research and Marketing (UK) Ltd* [2001] All ER (D) 48 (Nov), the English Court of Appeal by a majority (Mantell LJ dissenting) held that the defendant's failure to attempt verification did not vitiate the defendant's plea of qualified privilege. The Court of Appeal further held that there would be circumstances where, as in that case, the public was entitled to be informed of a political dispute, which was being fully, fairly and disinterestedly reported without

having to wait for the publisher, following an attempt at verification, to commit himself to one side or the other.

[42] The key words to my mind, is that the impugned words must be 'fully, fairly and disinterestedly reported'. The danger lies not in the reporting itself, but in the possible embellishments. Any attempt to adopt the allegations would disentitle the defendant from *Reynolds* privilege. I find support in this proposition in the judgment of Harmindar JC (now JCA) in the case of *Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor* [2010] 2 MLJ 492; [2010] 3 AMR 514 who held as follows:

> The report, taken as a whole, must have the effect that the defamatory material is attributed to the parties in the dispute. The report must not be seen as being put forward to establish the truth of any of the defamatory assertions. This means that the allegations must be reported in a fair, disinterested and neutral way. The important consideration here is that the allegations are attributed and not adopted. Therefore reportage will not apply where the journalist had embraced, garnished and embellished the allegations.

I accept the evidence given by SD2 as being the true narrations of the background and circumstances that led to the publication of the impugned statements, and that there was no malice involved on the part of the second. defendant. It is also my finding that the allegations contained in the impugned statements were attributed and not adopted by the second defendant.

[43] Our society must by now learn to accept that the press, known as the fourth estate, has a role to play in democratic Malaysia. I accept that the media has a role and even duty in the dissemination of news that is of public interest and concern, for so long as it is exercised responsibly, as in the instant case. In *Sivabalan a/l P Asapathy v The New StraitsTimes Press (M) Bhd* [2010] 9 MLJ 320 Mohd Zawawi Salleh J (now JCA) had made the following remarks:

> The *Reynold*'s privilege represents a reasonable and proportionate response to the need to protect reputation w hile sustaining t he public exchange of information that is vital to modern Malaysian society.

[44] In *Jameel (Mohammed) and another v Wall Street Journal Europe Sprl* [2007] 1 AC 359 (HL), the impugned article was clearly defamatory of the plaintiff as it contained insinuations that the plaintiff was involved in the funding of a terrorist group, which was later found out to be false. The House of Lords by a majority (Lord Hoffmann and Baroness Hale of Richmond dissenting) in allowing the appeal held that that the defence of qualified privilege claimed by the defendant derived from the general obligation of a publisher to communicate important information on a matter of real public

interest, which the public had a general entitlement to receive.

[45] The House of Lords in *Jameel* further held that where the impugned article as a whole concerned a matter of public interest, the inclusion of a defamatory statement of which complaint was made might be justifiable so long as it made a proper contribution to the whole thrust of the publication. I therefore hold that under the circumstances of the case, the second defendant had acted reasonably on the issue of 'public interest and concern' in relying on the English version of the *Bernama* wire news.

CONCLUSION

[46] ln the result, I find that the second defendant had successfully raised the defence of *Reynolds* privilege and is therefore not liable. However, in view of my finding that the impugned statements were false, I am making a consequential order that the second defendant be restrained, and a permanent injunction is hereby issued to restrain the second defendant, its servants or agents or otherwise from writing or further publishing, or causing or permitting to be published the impugned statements or any other words to the same or any similar effect in any manner whatsoever in the future.

[47] I also rule that an apology is not out of place, and the second defendant should publish an unconditional apology to the plaintiff within seven days from the pronouncement of the judgment, wherein the apology must be published in the *Star Online*.

[48] There will be no order as to costs.

[49] As regard to the first defendant, I hold that the first defendant has failed in his defence in this action, and as a consequential order thereto, it is my further finding that the first defendant is liable and that the plaintiff is entitled to the damages which will be assessed later on a date to be fixed.

[50] I am making a similar restraining order in the form of a permanent injunction restraining the first defendant, from speaking or further publishing, or causing or permitting to be published the.impugned statements or any other words to the same or any similar effect in any manner whatsoever in the future. I also make a further order that the first defendant do publish an unconditional apology to the plaintiff within seven days from the pronouncement of the judgment, wherein the apology must be published in the *Star Online*. The first defendant is to pay costs to the plaintiff for the sum of RM30,000 subject to allocatur.

Order accordingly.

Reported by Dzulqarnain Ab Fatar